

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

September 19, 2006 Session

ALLISON SHEA MINTON v. TIMOTHY JAMES FOX

Appeal from the Juvenile Court for Loudon County
No. J19968 William H. Russell, Judge

No. E2005-02740-COA-R3-CV - FILED OCTOBER 24, 2006

This is a child custody dispute which began when Allison Shea Minton (“Mother”) filed a petition for paternity claiming Timothy James Fox (“Father”) was the biological father of Mother’s son. Father responded to the petition and admitted he was the child’s biological father. Father had never denied the child was his, and Mother and Father had established a co-parenting time schedule on an amicable basis for several years after the child was born and before Mother filed her petition. The custody battle began when Mother’s new husband joined the Navy and the family moved to Virginia. Once that happened, both Mother and Father sought to be designated as the child’s primary residential parent. Following a trial, the Trial Court determined that Mother should be designated as the child’s primary residential parent and entered an order to that effect which also set Father’s child support payments, the amount of Father’s child support arrearages, as well as Father’s co-parenting time. Father appeals the Trial Court’s order designating Mother as the primary residential parent. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Juvenile Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Gregory H. Harrison, Knoxville, Tennessee, for the Appellant, Timothy James Fox.

Felisha B. White, Seymour, Tennessee, for the Appellee, Allison Shea Minton.

OPINION

Background

This litigation began in April of 2005 when Mother filed a Petition for Paternity and to Set Visitation and Child Support claiming Father was the biological father of Mother's four year old son, who was born out of wedlock in April of 2001. At the time the petition was filed, Mother and child were residents of Loudon County, Tennessee and Father was a resident of Knox County, Tennessee. Mother requested that she be designated the child's primary residential parent, that visitation for Father be established, and that Father be required to pay child support.

Father responded to the petition and admitted that he was the child's biological father. Father claimed, however, that it was in the child's best interests for him to be designated as the child's primary residential parent. Father also requested that visitation for Mother be established as well as an appropriate amount of child support to be paid by Mother.

In June of 2005, Father filed a motion for emergency custody and for the return of the child to the jurisdiction of the court. In this motion, Father noted that he was actively seeking custody of the child and that he and Mother had been spending substantially equal amounts of time caring for the child. Father further claimed that he was notified via telephone that Mother and the child suddenly had moved to Virginia. According to Father, the relocation was accomplished without his knowledge or approval. Father claimed that Mother's relocating with the child was in violation of the Parental Relocation Statute, Tenn. Code Ann. § 36-6-108, and that such a move was not in the child's best interests. The Trial Court granted Father's motion, awarded Father temporary custody of the child, and granted Mother co-parenting time.

A hearing was conducted on July 15, 2005, with the first witness being Mother. Mother testified that she currently lived in Virginia Beach, Virginia, in a two bedroom apartment with the child and her current husband, who is in the United States Navy. Mother stated that with her husband being in the military, she does not have to work as much and eventually can go back to school. Mother plans on returning to school once the child begins school next year. Mother's husband is stationed in Virginia for four years.

Mother claims that she spoke with Father about Mother's husband joining the Navy and the impending move to Virginia. Mother told Father that she and the child would be moving when her husband was assigned a station. Mother claims Father told her that was unacceptable and that he would "fight it." After that conversation, Father would not talk with Mother and any conversations about the move were between Mother and Father's wife. Mother stated that she tried to talk to Father several times about the move before the actual move happened, but Father refused to return her phone calls. Prior to Father obtaining temporary custody of the child, Mother had agreed to Father having the child for two weeks in July and then again in September. Mother claimed she filed the original petition prior to her move to Virginia to make sure she was "doing everything properly."

Mother stated that upon her return to Virginia following the hearing, she has a job waiting for her at a drug store working 25 to 30 hours per week. Mother worked at CVS pharmacy in Lenoir City for approximately four years before she moved to Virginia. Although Mother could not recall the amount of her husband's monthly military pay, she stated that he received, in addition to his regular pay, a housing, food, and clothing allowance.

Mother was living with her parents when the child was born. She eventually moved out of her parent's residence and began living in subsidized housing. Mother stated that Father spent several hours a week with the child after he was born. Once Mother returned to work, Father exercised co-parenting time for two full days every other weekend. In addition, every other week Father exercised co-parenting time Monday through Thursday from 3:30 p.m. until 10:30 p.m., while Mother was at work. During the summer months, Father would exercise co-parenting time with the child alternating weeks between parents. Father would exercise additional co-parenting sporadically and depending on his wife's work schedule.

Mother claimed Father never paid any child support after the child was born, nor did he provide health insurance for the child. Mother and child were on TennCare. The child is currently covered with health insurance offered through the military. Although Father never paid any child support, Father's mother frequently gave Mother money ranging from \$60 to \$80.

Mother stated that she has been the primary caregiver ever since the child was born. According to Mother, Father did not spend an equal amount of time caring for the child. Mother described the relationship between the child and her current husband as "wonderful." Her husband helps take care of the child. Mother stated that until the child starts school, she would be fine with Father exercising co-parenting time for one month every other month. However, once school starts she would want a more traditional schedule with Father having the child most of the summer and every other fall and winter break, alternating Christmas holidays, etc. Mother acknowledged that Father was a good father.

On cross-examination, Mother admitted that she and her current husband lived together despite not being married when her current husband moved in with her and the child in 2003. Mother's husband at the time of the hearing had been out of town with the military for three weeks. Her husband is scheduled to be gone for six months beginning in September of 2006. Mother stated that the military provides a large network of daycare and in-home care. Mother acknowledged that when the child starts daycare, he will be cared for by someone that he does not know. However, if the child were to live in Tennessee with Father, he would be cared for by Father's relatives. Mother agreed that Father has been employed the entire time Mother has known Father. Father works for a family business and is a hard worker.

The next witness was Father, who testified that he is employed at Fox Pool and Spa, a family owned business. Father stated that he and Mother had been alternating weeks with the child and in June of 2005, when it was Father's turn, Mother had simply packed up and moved to Virginia Beach. Father claimed he never heard Virginia Beach mentioned prior to Mother abruptly moving

to that city. Mother had, however, mentioned in passing that she may move at some point in the future.

Father did not exercise any overnight visitation for the first month after the child was born, and this was at the recommendation of the doctor. Father did visit with Mother and the child at least three times a week during the first month. Father provided food and clothing for the child. Father paid Mother's car insurance of approximately \$200 a month until the child was two years old. Father estimated that he gave Mother on average \$300 a month for the first two years after the child was born, which included his payments for car insurance on Mother's behalf. After the child was one month old, Father and Mother began a schedule with each of them having the child for one week at a time. Father's week with the child would be the same week that Father exercised visitation with his son by a previous marriage. According to Father:

[S]tarting at about one month, we began to keep him, he'd come to my house and then we started moving to overnights. And then ... at least when he was one, he would start staying the night very regularly, all weekend and then very regularly throughout the week.

When asked if he paid any child support to Mother, Father stated:

I paid her car insurance because she had no other bills [at that time since she was living with her parents.] And she expressed that to me so I paid that. And like she said, if she came over and [said], "Hey, I need money" I would give her money. My mom gave her money on my behalf. She would stop by the pool store and, you know, my mom would give her money, which I would reimburse my mother for it.... My mother gave her money on a weekly basis.

Father currently is constructing a 3,800 square foot house on a 30 acre farm owned by Father's parents. The house is to be completed in September of 2005. If Father obtained primary residential custody of the child, the child would have his own room. The child is very healthy and happy when in Father's custody. All of Father's extended family get along well with the child and they have had many opportunities to be around the child. Father stated his family members provide a very good support network.

Father attended the child's second birthday party given by Mother. At the party, several of Mother's friends were drinking alcohol and were loud. After that, Father began having separate birthday parties for the child. Father stated that the child has a very good relationship with Father's wife and Father's other son. While Father believed he could offer a more structured environment for the child, he acknowledged that he was not claiming that Mother was not a good parent.

Following the hearing, the Trial Court entered an order finding that the parties were able to get along and share co-parenting time reasonably well, up until the time Mother moved to Virginia. The Trial Court then stated that, “[c]onsidering all the statutory provisions the Court is required to consider; the Court finds that [Mother] is the person to be the primary residential parent.” A parenting plan was adopted by the Court which provided for equal co-parenting time up until the time the child begins school. Thereafter, Mother would have primary physical custody of the child, but the child would reside with Father for all but one week during the summer months. Father would have physical custody of the child during the spring and fall breaks, and approximately one-half of the Christmas break. The Trial Court also ordered Father to begin making child support payments and further determined that Father was \$17,352 in arrears.

Father appeals raising two issues, which we quote:

- I. Is the scope of review pursuant to Rule 13(d) of the *Tennessee Rules of Appellate Procedure* de novo upon the record of the trial court with a presumption of correctness, or is review de novo without a presumption of correctness based upon the trial court’s failure to make findings of fact?
- II. Did the trial court err in its failure to appropriately apply the best interest analysis as contained within *Tennessee Code Annotated* § 36-6-106 in determining child custody?

Discussion

In *Burnett v. Burnett*, No. E2002-01614-COA-R3-CV, 2003 WL 21782290 (Tenn. Ct. App. July 23, 2003), *no appl. perm. appeal filed*, this Court discussed the relevant standard of review in child custody cases. We stated:

The standard of review on appeal for issues addressing child custody and visitation was set forth by our Supreme Court in *Suttles v. Suttles*, 748 S.W.2d 427 (Tenn. 1988), and recently reaffirmed in *Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001). In *Suttles*, the Court acknowledged the general rule that:

Although ... “the details of custody and visitation with children are peculiarly within the broad discretion of the trial judge,” *Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn. App. 1973), and that the trial court's decision will not ordinarily be reversed absent some abuse of that discretion, “in reviewing child custody and visitation cases, we must remember that the welfare of the child has always been the

paramount consideration” for the courts. *Luke v. Luke*, 651 S.W.2d 219, 221 (Tenn. 1983)....

Suttles, 748 S.W.2d at 429. The Supreme Court further explained the abuse of discretion standard in *Eldridge*, stating:

Under the abuse of discretion standard, a trial court's ruling “will be upheld so long as reasonable minds can disagree as to propriety of the decision made.” *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

Eldridge, 42 S.W.3d at 85.

Burnett, 2003 WL 21782290, at ** 5, 6.

A list of non-exclusive factors to be considered by the trial court in child custody matters are set forth in Tenn. Code Ann. § 36-6-106(a) which provides, in relevant part, as follows:

§ 36-6-106. Child custody. – (a) In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, such determination shall be made upon the basis of the best interest of the child. The court shall consider all relevant factors including the following where applicable:

(1) The love, affection and emotional ties existing between the parents and child;

(2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;

(3) The importance of continuity in the child’s life and the length of time the child has lived in a stable, satisfactory environment;...

(4) The stability of the family unit of the parents;

(5) The mental and physical health of the parents;

(6) The home, school and community record of the child;

(7) (A) The reasonable preference of the child if twelve (12) years of age or older.

(B) The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that where there are allegations that one (1) parent has committed child abuse, as defined in §§ 39-15-401 or 39-15-402, or child sexual abuse, as defined in § 37-1-602, against a family member, the court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of fact connected thereto. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;

(9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and

(10) Each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

Tenn. Code Ann. § 36-6-106(a).

The first issue we will discuss is whether, due to the Trial Court's lack of any detailed factual findings, the standard of review is de novo with no presumption of correctness accorded to any of the Trial Court's findings. In *Burnett, supra*, we emphasized that we "strongly encourage" trial courts to be as detailed as possible when making findings regarding child custody. See *Burnett*, 2003 WL 21782290, at *6, n.4. Unfortunately, our encouragement is not always heeded, as in the present case. Having said that, in *Burnett* we also pointed out that while the relevant statute "does

require a trial court to consider all of the listed factors which are applicable ..., the statute does not require a trial court, when issuing a memorandum opinion or final judgment, to list every applicable factor along with its conclusion as to how that particular factor impacted the overall custody determination.” *Burnett*, 2003 WL 21782290, at * 6. *See also Joiner v. Griffith*, No. M2003-00536-COA-R3-JV, 2004 WL 1334519 (Tenn. Ct. App. June 14, 2004), *perm. app. denied Oct. 11, 2004* (pointing out that only the eighth factor set forth in Tenn. Code Ann. § 36-6-106(a) requires a trial court to make detailed findings of fact).¹

In the present case, the Trial Court stated that after considering the various statutory factors, “the Court finds that [Mother] is the person to be the primary residential parent.” Necessarily implicit in this ruling is a factual finding that it was in the best interests of the child for Mother to be designated as the primary residential parent. Factual findings of a trial court are accorded a presumption of correctness. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). We will accord a presumption of correctness to the implicit factual finding of the Trial Court that it was in the best interest of the child for Mother to be designated as the primary residential parent. However, we still must examine the relevant statutory factors when determining if the evidence preponderates against the Trial Court’s ultimate factual finding.

This leads us to the next and primary issue in this appeal, which is whether the Trial Court erred when it found that it was in the child’s best interests for Mother to be the primary residential parent. To be sure, some of the relevant statutory factors tend to favor Mother over Father, and vice versa. The Trial Court was confronted with a difficult decision of choosing between two fit parents, each of whom very much loves the child and can provide a proper home and nurturing environment. The child is fortunate to have a fit Mother and a fit Father who both want to be the primary residential parent. There is no doubt that reasonable minds could differ on which of these two parents was *more* fit to be the primary residential parent. After considering all of the relevant facts and circumstances of this case, including the Trial Court’s finding that the parties were able to work together and share co-parenting time reasonably well even before Mother filed the petition to establish paternity, a finding that shows Mother’s willingness and ability to facilitate and encourage the relationship between Father and the child, we simply are unable to conclude that the Trial Court abused its discretion when it found that Mother should be the child’s primary residential parent. Accordingly, the decision of the Trial Court is affirmed.²

The final issue is Mother’s claim that she should be awarded attorney fees incurred on this appeal. Considering both that this litigation was precipitated by Mother’s abrupt move to Virginia and that both parties, fit parents each, had every right to seek to be designated as the primary residential parent in this initial custody determination, we decline to award Mother any attorney fees.

¹ A second appeal in the *Joiner* case can be found at *Joiner v. Griffith*, No. M2004-02601-COA-R3-CV, 2006 WL 2135441 (Tenn. Ct. App. July 31, 2006), *no appl. perm. appeal filed*.

² Although Father briefly mentions that Mother violated the Parental Relocation Statute, Tenn. Code Ann. § 36-6-108, when she suddenly moved to Virginia, Father does not raise any separate issues surrounding the Parental Relocation Statute.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant Timothy James Fox, and his surety.

D. MICHAEL SWINEY, JUDGE